to pay. It is an engagement to pay if the bank does not. *Cf. Byrd Printing Co.* v. *Whitaker Paper Co.* (1911) 135 Ga. 865, 70 S. E. 798; N. I. L. § 61. If there is a consideration, the engagement is of course binding. And there is always a rebuttable presumption of consideration. *Louisville, Evansville & St. Louis Ry.* v. *Caldwell* (1884) 98 Ind. 245; see *Averett's Adm'r* v. *Booker* (1859) 56 Va. *163, *164 *et seq.; cf.* N. I. L. § 24; *contra, Kinsella* v. *Lockwood* (1913) 79 Misc. 619, 140 N. Y. Supp. 513. So it would seem that the better view is the alternative rejected by the court in the instant case; namely, that the telegram was only an instruction to the bank as agent, to pay. In the instant case the distinction was immaterial, but in another it may be decisive.

SALES—ACCEPTANCE OF DEFECTIVE GOODS—BREACH OF WARRANTY AS DEFENCE.—The plaintiff contracted to sell the defendant forty cars of tomatoes, of a certain grade, and free from certain defects, to be shipped at the rate of one a day. Thirty cars were shipped. The last nine carloads were defective, and the vendee gave notice to the plaintiff of the defects but accepted them. The vendor brings this action for the last nine cars on two counts, one for the contract price and the second a common count for the value of the goods. *Held, inter alia,* the vendee has a defence to an action on the contract. The seller can only recover on the *quantum valebant* count. *Standard Growers' Exchange* v. *Howard et al.* (Fla. 1921) 89 So. 345.

The decision in the instant case can be supported only upon the theory that delivery of inferior goods amounts to a failure of consideration. *Cf. Ruiz* v. *Norton* (1854) 4 Cal. 355; *Andrews* v. *Eastman et al.* (1868) 41 Vt. 134. A vendee may reject goods which are not as specified. *Flour Mills Co.* v. *Moll* (1920) 106 Kan. 827, 189 Pac. 940. But one who retains defective goods is liable for the purchase price. *Lieberman* v. *Beck & Cohaim, Inc.* (1920) 179 N. Y. Supp. 472. Such acceptance, however, does not waive the right of the vendee to sue or counterclaim for the breach of warranty. *Taylor* v. *Cole* (1873) 111 Mass. 363; *English et al.* v. *Spokane Commission Co.* (1891) 48 Fed. 196. Where no notice of the defect is given to the vendor within a reasonable time after the vendee learns of it, the vendee loses his right to take advantage of the breach. *Wright* v. *Dubbolde et al.* (1919) 42 S. Dak. 12, 172 N. W. 500. Some courts hold that such notice is not necessary. See *English et al.* v. *Spokane Commission Co., supra,* 198. But in an action for the price, it is no defence for the vendee who has retained the goods, to show that they were defective. *Chambers* v. *Lancaster* (1899) 160 N. Y. 342, 54 N. E. 707. If the goods are wholly valueless, it is a good defence, because then there has been a total failure of consideration. *Imperial Gas Engine Co.* v. *Auteri* (1919) 40 Cal. App. 419, 180 Pac. 946. The Uniform Sales Act § 69 limits the remedy of the buyer who has accepted defective goods to a counterclaim or an action for the breach of warranty. *Lieberman* v. *Beck & Cohaim, Inc., supra, (semble).* The instant case seems an unsound departure. By knowingly retaining the defective goods, the vendee affirms the contract, and hence the defect is no defence to an action on the contract. The vendee may counterclaim or sue for the breach of warranty, and thus be compensated for his actual damage and amply protected.

SALES—CONDITIONAL SALE DISTINGUISHED FROM CHATTEL MORTGAGE.—The plaintiff sold cattle to B under a conditional sale note reserving title until the note was paid, and the right to re-take and sell at any time, the vendee being liable for any deficiency. B sold the cattle to the defendant who claimed that the above instrument was a chattel mortgage, and, not being registered, was void as against him. *Held,* one judge dissenting, the transaction was a conditional sale. *Inter alia,* if the